No. 14-1096

In the Supreme Court of the United States

JORGE LUNA TORRES,

Petitioner,

v.

LORETTA E. LYNCH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

STUART BANNER
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095

MATTHEW L. GUADAGNO
Counsel of Record
265 Canal Street, Ste. 506
New York, NY 10013
(212) 343-1373
Matthew@Guadagno-Immigration.com

QUESTION PRESENTED

Whether a state offense constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43), on the ground that the state offense is "described in" a specified federal statute, where the federal statute includes an interstate commerce element that the state offense lacks.

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES x
BRIEF FOR PETITIONER x
OPINIONS BELOW 1
JURISDICTION 1
STATUTE INVOLVED 1
STATEMENT 2
I. Legal background 3
A. The definition of "aggravated felony" 3
B. The BIA's conflicting interpretations 7
II. Facts and proceedings below 9
SUMMARY OF ARGUMENT 11
ARGUMENT 14
I. The New York offense of arson is not "described in" 18 U.S.C. § 844(i), because it lacks one of the elements listed in section 844(i). 14
A. "Described in" means "described in," not "described in except for one element." 15
B. Congress's use of the phrase "an offense described in" 18 U.S.C. § 844(i), rather than the generic term "arson," indicates that Congress did not intend ordinary state-law arson to be an aggravated felony. 20

C. An element of an offense cannot be ignored just because the element ensures that Congress has the power to punish the offense. 26

D. Including the interstate commerce element does not render the penultimate sentence of section 1101(a)(43) a nullity, because most of the offenses listed in section 1101(a)(43) have no interstate commerce element. 29

II. The doctrine that statutes should not be interpreted to produce absurd results has no bearing on this case, because it was quite reasonable for Congress to exclude ordinary state-law arson from the definition of aggravated felony. 32

A. It would not have been absurd for Congress to determine that some federal offenses tend to be more serious than their state variants. 33

B. It would not have been absurd for Congress to take into account that serious state offenses not defined as aggravated felonies are already covered by other provisions of the INA. 36

III. If the statute were ambiguous, it would have to be construed against the government under both the rule of lenity and the principle of construing ambiguities in deportation statutes in favor of the alien. 38

A. Because this statute has criminal applications as well as civil applications, any ambiguities must be resolved against the government under the rule of lenity. 39

B. Because deportation is one of the consequences of an aggravated felony conviction, ambiguities in the statute must be construed in favor of the alien. 44

C. The BIA is not entitled to *Chevron* deference in any event, because its interpretation of section 1101(a)(43) is unreasonable. 47

CONCLUSION 49

APPENDIX: 8 U.S.C. § 1101(a)(43) 1a

TABLE OF AUTHORITIES

CASES

Abramski v. United States, 134 S. Ct. 2259 (2014) 41
Adams v. Holder, 692 F.3d 91 (2d Cir. 2012) 46
Alexander v. Sandoval, 532 U.S. 275 (2001) 45
Babbitt v. Sweet Home Chapter, 515 U.S. 687 (1995) 43
Bautista v. Attorney Gen., 744 F.3d 54 (3d Cir. 2014) 7, 10
Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010) 25, 33, 38
Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722 (6th Cir. 2013) 42
Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) ..... passim
Clark v. Martinez, 543 U.S. 371 (2005) 41
Costello v. INS, 376 U.S. 120 (1964) 44
Crandon v. United States, 494 U.S. 152 (1990) 41
Crooks v. Harrelson, 282 U.S. 55 (1930) 32, 38
EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991) 45
Espinal-Andrades v. Holder, 777 F.3d 54 (4th Cir. 2015), *pet for cert. pending*, No. 14-1268 (filed Apr. 22, 2015) 7, 15, 29
Fong Haw Tan v. Phelan, 333 U.S. 6 (1948) 44
Holder v. Martinez Gutierrez, 132 S. Ct. 2011 (2012) 46
INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) 46

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 44
INS v. Errico, 385 U.S. 214 (1966) 44
INS v. St. Cyr, 533 U.S. 289 (2001) 44, 45
Johnson v. United States, 135 S. Ct. 2551 (2015) 22
Jones v. United States, 529 U.S. 848 (2000) 7, 16, 23, 28
Judulang v. Holder, 132 S. Ct. 476 (2011) 46
Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011) 40, 42
Kawashima v. Holder, 132 S. Ct. 1166 (2012) 44
Keene Corp. v. United States, 508 U.S. 200 (1993) 21
Leocal v. Ashcroft, 543 U.S. 1 (2004) 39
Lopez v. Gonzalez, 549 U.S. 47 (2006).. 5, 6, 16, 21, 25
Maracich v. Spears, 133 S. Ct. 2191 (2013) 40
McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479 (1991) 45
Mellouli v. Lynch, 135 S. Ct. 1980 (2015) 46
Moncrieffe v. Holder, 133 S. Ct. 1678 (2013)..... 5, 38
National Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) 49
Negrete-Rodriguez v. Mukasey, 518 F.3d 497 (7th Cir. 2008) 7, 29
Negusie v. Holder, 555 U.S. 511 (2009) 46
Nieto Hernandez v. Holder, 592 F.3d 681 (5th Cir. 2009) 7, 29
Nijhawan v. Holder, 557 U.S. 29 (2009) 5
Public Citizen v. United States Dept. of Justice, 491 U.S. 440 (1989) 32

Ruiz-Almanzar v. Ridge, 485 F.3d 193 (2d Cir. 2007) 46
Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191 (2014) 41, 46
Spacek v. Holder, 688 F.3d 536 (8th Cir. 2012) 7, 29
Sturges v. Crowninshield, 17 U.S. 122 (1819) ..33, 35
United States v. Bass, 404 U.S. 336 (1971) 28
United States v. Castillo-Rivera, 244 F.3d 1020 (9th Cir. 2001) 7, 29
United States v. Gaudin, 515 U.S. 506 (1995) 28
United States v. Hudson, 11 U.S. 32 (1812) 41
United States v. Mitchell, 23 F.3d 1 (1st Cir. 1994) 31
United States v. O'Hagan, 521 U.S. 642 (1997) 43
United States v. Santos, 553 U.S. 507 (2008) 40
United States v. Thompson/Center Arms Co., 504 U.S. 505 (1992) 40, 42
Vuksanovic v. Attorney General, 439 F.3d 1308 (11th Cir. 2006) 37
Whitman v. United States, 135 S. Ct. 352 (2014) 41, 42
Wyeth v. Levine, 555 U.S. 555 (2009) 45
Zadvydas v. Davis, 533 U.S. 678 (2001) 45

ADMINISTRATIVE DECISIONS

In re Vasquez-Muniz, 22 I. & N. Dec. 1415 (BIA 2000) 8, 15, 47, 49
In re Vasquez-Muniz, 23 I. & N. Dec. 207 (BIA 2002) 8, 47, 48, 49

Matter of Bautista, 25 I. & N. Dec. 616 (BIA 2011), *vacated by Bautista v. Attorney Gen.*, 744 F.3d 54 (3d Cir. 2014) 8, 10

STATUTES

8 U.S.C.

§ 1101 ..... 3, 18
§ 1101(a)(43) ..... passim
§ 1101(a)(43)(A) 4, 6, 21, 29
§ 1101(a)(43)(B) 4, 19, 30
§ 1101(a)(43)(C) 19, 30, 31
§ 1101(a)(43)(D) 4, 6
§ 1101(a)(43)(E) 4, 20, 24, 26, 31
§ 1101(a)(43)(E)(i) 4
§ 1101(a)(43)(E)(ii) 30, 35
§ 1101(a)(43)(E)(iii) 30
§ 1101(a)(43)(F) 19, 30, 36
§ 1101(a)(43)(G) 4, 21, 29
§ 1101(a)(43)(H) 27
§ 1101(a)(43)(I) 35
§ 1101(a)(43)(J) 30, 35
§ 1101(a)(43)(K) 23
§ 1101(a)(43)(K)(i) 29
§ 1101(a)(43)(K)(iii) 30
§ 1101(a)(43)(L)(i) 30
§ 1101(a)(43)(L)(ii) 30
§ 1101(a)(43)(L)(iii) 30
§ 1101(a)(43)(M)(i) 29
§ 1101(a)(43)(N) 30
§ 1101(a)(43)(O) 30
§ 1101(a)(43)(P) 30
§ 1101(a)(43)(Q) 29
§ 1101(a)(43)(R) 30

8 U.S.C.

§ 1101(a)(43)(S) 30
§ 1101(a)(43)(T) 29
§ 1102 18
§ 1105 18
§ 1151 18
§ 1152 18
§ 1153 18
§ 1154 18
§ 1157 18
§ 1158 18
§ 1158(b)(2)(B)(i) 3
§ 1160 18
§ 1182 18
§ 1182(a)(9)(A)(ii) 3
§ 1182d 18
§ 1183a 18
§ 1184 18
§ 1186a 18
§ 1186b 18
§ 1187 18
§ 1188 18
§ 1189 18
§ 1202 18
§ 1225 18
§ 1226 18
§ 1226a 18
§ 1227 18
§ 1227(a)(2)(A)(i) 36
§ 1227(a)(2)(A)(ii) 37
§ 1227(a)(2)(A)(iii) 3, 36, 39, 44
§ 1227(a)(2)(A)(iv) 37
§ 1227(a)(2)(A)(v) 37

8 U.S.C.
§ 1227(a)(2)(B) 37
§ 1227(a)(2)(C) 37
§ 1227(a)(2)(D) 37
§ 1227(a)(2)(E) 37
§ 1228 18
§ 1228(a)(3)(A) 3
§ 1229 18
§ 1229a 18
§ 1229b 18
§ 1229b(a)(3) 3, 9, 39
§ 1229c 18
§ 1231 18
§ 1231(a)(4)(B)(ii) 31, 48
§ 1231(b)(3)(B) 3
§ 1232 18
§ 1252 18
§ 1253 18
§ 1253(a)(1) 3, 39
§ 1254a 18
§ 1254b 18
§ 1255 18
§ 1255a 18
§ 1258 18
§ 1281 18
§ 1288 18
§ 1321 18
§ 1324 18
§ 1324(a)(1)(A) 30
§ 1324(a)(2) 30
§ 1324a 18
§ 1324b 18
§ 1324c 18

8 U.S.C.
§ 1325(a) 30
§ 1326 ..... 18, 30
§ 1326(a) 3, 39
§ 1326(b)(2) 3, 39
§ 1327 ..... 3, 39
§ 1330 18
§ 1356 18
§ 1357 18
§ 1365a 18
§ 1365b 18
§ 1368 18
§ 1372 18
§ 1375a 18
§ 1375b 18
§ 1375c 18
§ 1376 18
§ 1378 18
§ 1379 18
§ 1380 18
§ 1381 18
§ 1421 18
§ 1424 18
§ 1427 18
§ 1430 18
§ 1433 18
§ 1435 18
§ 1438 18
§ 1439 18
§ 1440 18
§ 1440-1 18
§ 1440f 18
§ 1441 18

8 U.S.C.
§ 1455 18
§ 1457 18
§ 1503 18
§ 1522 18
§ 1531 18
§ 1534 18
§ 1535 18
§ 1536 18
§ 1537 18
§ 1573 18
§ 1574 18
§ 1611 18
§ 1612 ..... 18, 20
§ 1613 18
§ 1615 18
§ 1622 ..... 18, 20
§ 1624 18
§ 1631 18
§ 1632 18
§ 1642 18
§ 1711 18
§ 1713 18
§ 1721 18
§ 1722 18
§ 1723 18
§ 1724 18
§ 1731 18
§ 1732 18
§ 1733 18
§ 1737 18
§ 1751 18
§ 1752 18

8 U.S.C.
§ 1753 18
§ 1761 18
§ 1771 18
§ 1776 18
15 U.S.C.
§ 77b-1(b)(2) 19
§ 78c(a)(78) 19
§ 78ff(a) 43
§ 78n(e) 43
§ 2220(1) 22
16 U.S.C. § 1540(b)(1) 43
18 U.S.C.
§ 16 19
§ 793 30
§ 798 30
§ 841(c) 19
§ 842 4
§ 844 4
§ 844(f) 26, 27
§ 844(i) ..... passim
§ 846(b) 22
§ 876 27
§ 921 19
§ 922 4
§ 922(g) 35
§ 922(o) 30, 31
§ 922(p) 30, 31
§ 922(r) 30, 31
§ 924 4
§ 924(c) 4, 19
§ 924(e)(1) 22
§ 924(e)(2)(B)(ii) 22

18 U.S.C.
§ 924(h) 30, 31
§ 1111(a) 22
§ 1153(a) 22
§ 1461 22
§ 1546(a) 30
§ 1581 30
§ 1585 30
§ 1588 30
§ 1590 30
§ 1952(b) 22
§ 1955 30
§ 1956 ..... 4, 6
§ 1957 4
§ 1961(1)(A) 22
§ 1962 35
§ 2153 30
§ 2252 35
§ 2381 30
§ 2382 30
§ 3142(e)(2)(A) 24
§ 3142(f)(1)(D) 24
§ 5032 24
20 U.S.C. § 1061 19
21 U.S.C. § 802 ..... 4, 19
26 U.S.C.
§ 1(h)(11)(B)(ii)(III) 17
§ 404(k) 17
§ 5861 ..... 4, 30, 31
28 U.S.C. § 1254(1) 1
38 U.S.C.
§ 101 20
§ 101(2) 20

38 U.S.C.
§ 107 20
§ 1101 20
§ 1101(1) 20
§ 1301 20
42 U.S.C. § 17034(a)(2) 19
50 U.S.C. § 3121 30

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4469-70 26
Bail Reform Act of 1984, Pub. L. No. 98-473, § 203(a), 98 Stat. 1976 24
Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 5048 26
Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4320-22 26

Ariz. Rev. Stat. § 13-1703(B) 25
Ark. Stat. § 5-38-301(b)(1) 25
Colo. Rev. Stat. § 18-4-103(3) 25
Del. Code tit. 11, § 804(b)(1) 25
D.C. Code § 22-303 25
Fla. Stat. § 806.031(1) 25
Iowa Code § 712.4 25
Md. Code, Criminal Law § 6-105(c) 25
Mich. Stat. § 750.77(3) 25
Minn. Stat. § 609.5632 25
Mo. Rev. Stat. § 569.053(2) (effective Jan. 1, 2017) 25
Neb. Rev. Stat. § 28-504(3) 25
N.H. Rev. Stat. § 634:1(IV) 25
N.M. Stat. § 30-17-5(B) 25

N.Y. Penal Law
§ 110 9
§ 150.01 25
§ 150.10 ..... 7, 8, 9
Ohio Rev. Code § 2909.03(B)(2)(a) 25
Or. Rev. Stat. § 164.335(2) 25
S.C. Code § 16-11-150(a) 25
Tenn. Code § 39-14-304(b) 25
Utah Code § 76-6-102(5) 25
Va. Code. § 18.2-80 25
Wash. Rev. Code § 9A.48.050(2) 25
Wyo. Stat. § 6-3-104(b) 25

OTHER AUTHORITIES

The American Heritage Dictionary of the English Language (5th ed. 2011) 15
Black's Law Dictionary (5th ed. 1979) 15
Susan R. Klein et al., *Why Federal Prosecutors Charge: A Comparison of Federal and New York State Arson and Robbery Filings, 2006-2010*, 51 Hous. L. Rev. 1381 (2014) 34
John Panneton, *Federalizing Fires: The Evolving Federal Response to Arson Related Crimes*, 23 Am. Crim. L. Rev. 151 (1985) 34
U.S. House of Representatives Office of the Legislative Counsel, *House Legislative Counsel's Manual on Drafting Style* (1995) 19
U.S. Senate Office of the Legislative Counsel, *Legislative Drafting Manual* (1997) 19
Webster's New Collegiate Dictionary (1976) 15

BRIEF FOR PETITIONER

Petitioner Jorge Luna Torres respectfully requests that this Court reverse the judgment of the U.S. Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Second Circuit is published at 764 F.3d 152 (2d Cir. 2014) and appears at Pet. App. 1a. The opinion of the Board of Immigration Appeals is unpublished and appears at Pet. App. 15a. The opinion of the Immigration Judge is unpublished and appears at Pet. App. 18a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Second Circuit was entered on August 20, 2014. The Court of Appeals denied a timely petition for rehearing en banc on November 7, 2014. Pet. App. 24a. On January 16, 2015, Justice Ginsburg extended the time to file a petition for certiorari until March 9, 2015. No. 14A770. The petition for certiorari was filed on that date. This Court granted certiorari on June 29, 2015. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

8 U.S.C. § 1101(a)(43) is reproduced in the Appendix to this brief.

STATEMENT

This case is about whether the phrase "described in" bears its ordinary meaning in the Immigration and Nationality Act, or whether, as the government maintains, the phrase means something very different.

Petitioner George Luna[1] has been a lawful permanent resident of this country for 32 years, since he was nine years old. The only blemish on his record is a 1999 conviction in New York for attempted arson in the third degree, for which he was sentenced to one day in jail. Now the government plans to remove him from the country because of this conviction. Whether Luna is eligible to seek the discretionary relief of cancellation of removal depends on whether he was convicted of an "aggravated felony" under 8 U.S.C. § 1101(a)(43). That question turns on whether the New York offense of arson is "an offense described in" 18 U.S.C. § 844(i), the federal arson statute.

Under the plain meaning of the aggravated felony definition, the New York offense of arson is not "described in" the federal arson statute, because the New York offense lacks one of the elements of federal arson, the interstate commerce element.

---

[1] Petitioner's full name is Jorge Luna Torres. In accordance with Spanish-language naming customs, he uses the last name Luna. Because he has spent virtually all of his life in the United States, everyone calls him George, including his parents and siblings.

I. Legal background

A. The definition of "aggravated felony"

Under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, several important consequences flow from a determination that an offense constitutes an "aggravated felony."

Some are criminal consequences. When an alien has been convicted of an aggravated felony, helping the alien enter the country is a crime punishable by up to ten years in prison. 8 U.S.C. § 1327. It is a crime, also punishable by ten years in prison, for an alien to disobey an order of removal, if the alien was ordered removed for having been convicted of an aggravated felony. 8 U.S.C. § 1253(a)(1). A removed alien who reenters the United States can be imprisoned for two years, 8 U.S.C. § 1326(a), but if he has been convicted of an aggravated felony, the potential sentence balloons to twenty years, § 1326(b)(2).

Others are civil consequences. A person who has been convicted of an aggravated felony can be deported, 8 U.S.C. § 1227(a)(2)(A)(iii), is ineligible for cancellation of removal,§ 1229b(a)(3), is ineligible for asylum, § 1158(b)(2)(B)(i), is subject to expedited removal proceedings, § 1228(a)(3)(A), faces additional obstacles to reentering the U.S., § 1182(a)(9)(A)(ii), and can even be sent to a country where his life would be threatened, § 1231(b)(3)(B).

The INA defines "aggravated felony" in 8 U.S.C. § 1101(a)(43) by providing a long list of the crimes that qualify as aggravated felonies. The statute refers to these crimes in three different ways.

First, the statute refers to many crimes by their generic names. These include "murder," "rape," and "sexual abuse of a minor" (subsection A); "theft" and "burglary" (subsection G); and several others. Congress chose not to include arson in this list of generically-named crimes.

Second, the statute refers to a few crimes by incorporating definitions of terms that appear elsewhere in the U.S. Code. In these provisions, the statute refers to offenses that involve terms *"defined in"* another Code section. For example, subsection B refers to "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." The statutes cited in these parentheticals provide the definitions of the terms "controlled substance" and "drug trafficking crime."

Third, the statute refers to many crimes as "an offense *described in"* a particular U.S. Code section. These Code sections do not contain definitions; rather, they list the elements of crimes. *See, e.g.*, subsection D ("an offense described in" 18 U.S.C. §§ 1956 or 1957); subsection E ("an offense described in" various subsections of 18 U.S.C. §§ 842, 844, 922, or 924, or 26 U.S.C. § 5861). This is how the definition of aggravated felony incorporates the federal offense of arson, which appears in subsection E(i)'s reference to the "offense described in" 18 U.S.C. § 844(i), the federal arson statute.

After this list of crimes, the statute specifies that the term "aggravated felony" "applies to an offense described in this paragraph whether in violation of

Federal or State law." 8 U.S.C. § 1101(a)(43) (unnumbered penultimate sentence). To determine whether a state offense qualifies as an aggravated felony, Congress intended courts to use the categorical approach.[2] *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85 (2013).

> Under this approach we look not to the facts of the particular prior case, but instead to whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding aggravated felony. By "generic," we mean the offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison. Accordingly, a state offense is a categorical match with a generic federal offense only if a conviction of the state offense necessarily involved facts equating to the generic federal offense.

Id. at 1684 (citations, quotation marks, brackets, and ellipsis omitted).

The offenses referred to by their generic names are thus aggravated felonies in either their federal or state versions. *Lopez v. Gonzalez*, 549 U.S. 47, 57 (2006) ("a generic description ... not specifically couched as a state offense or a federal one, covers either one"). An offense falling within the generic description of murder, for example, is an aggravated

---

[2] The categorical approach is not used in certain narrow circumstances that are not present here. *See Nijhawan v. Holder*, 557 U.S. 29, 36-40 (2009).

felony whether it is state-law murder or federal-law murder, because it is referred to by its generic name in subsection A.

For the offenses referred to as "described in" specified sections of the U.S. Code, the categorical approach requires determining whether the state offense includes all the elements of the specified federal offense. *Lopez*, 549 U.S. at 57 ("a state offense whose elements include the elements of a felony punishable under [the specified federal statute] is an aggravated felony"). For example, subsection D lists as an aggravated felony "an offense described in section 1956 of Title 18," the section that proscribes money laundering. To determine whether state-law money laundering is an aggravated felony, a court would compare the elements of state-law money laundering with the elements of money laundering under 18 U.S.C. § 1956. If state-law money laundering includes all the elements listed in 18 U.S.C. § 1956, state-law money laundering would be an aggravated felony.

Some of the offenses "described in" sections of the U.S. Code include an element pertaining to interstate commerce. For example, the federal arson statute provides: "Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property *used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce* shall be imprisoned for not less than 5 years." 18 U.S.C. § 844(i) (emphasis added).

The New York arson statute under which George Luna was convicted lacks this interstate commerce element. The New York statute provides: "A person is guilty of arson in the third degree when he intentionally damages a building or motor vehicle by starting a fire or causing an explosion." N.Y. Penal Law § 150.10. The New York offense of arson thus does not include all the elements of the federal offense of arson. *Jones v. United States*, 529 U.S. 848, 859 (2000).

Under the categorical approach, a state offense is not "described in" a federal criminal statute if the federal statute includes an element that the state offense lacks. In that situation, the state conviction would not necessarily establish all the facts that would be needed to support a conviction under the federal statute. The dispute in this case is about whether there is an exception to this rule for an element pertaining to interstate commerce.[3]

B. The BIA's conflicting interpretations

The Board of Immigration Appeals has taken both sides of this issue. At first the BIA read section 1101(a)(43) literally, to mean that a state offense is not "described in" a federal statute if the state of-

---

[3] *Compare Bautista v. Attorney Gen.*, 744 F.3d 54, 58-68 (3d Cir. 2014), *with* Pet. App. 7a-12a; *Espinal-Andrades v. Holder*, 777 F.3d 163, 167-69 (4th Cir. 2015), *pet. for cert. pending*, No. 14-1268 (filed Apr. 22, 2015); *Nieto Hernandez v. Holder*, 592 F.3d 681, 684-86 (5th Cir. 2009); *Negrete-Rodriguez v. Mukasey*, 518 F.3d 497, 500-03 (7th Cir. 2008); *Spacek v. Holder*, 688 F.3d 536, 538-39 (8th Cir. 2012); *United States v. Castillo-Rivera*, 244 F.3d 1020, 1023-24 (9th Cir. 2001).

fense lacks the federal statute's interstate commerce element. In *In re Vasquez-Muniz*, 22 I. & N. Dec. 1415 (BIA 2000), the BIA rejected the government's contention that "jurisdictional" elements should be ignored in determining whether a state offense is "described in" a federal statute. The BIA observed that characterizing the interstate commerce element as "jurisdictional" "does not change the fact that it is an element of the offense." *Id.* at 1420.

But the BIA reached the opposite view thirteen months later. The BIA issued a new opinion in *Vasquez-Muniz* determining that a state offense may be "described in" a federal statute even if the state offense lacks an interstate commerce element present in the federal statute. *In re Vasquez-Muniz*, 23 I. & N. Dec. 207 (BIA 2002). The BIA now reasoned that "if state crimes must include a federal jurisdictional element in order to be classified as aggravated felonies, then virtually no state crimes would ever be included." *Id.* at 211.

In *Matter of Bautista*, 25 I. & N. Dec. 616 (BIA 2011), *vacated by Bautista v. Attorney Gen.*, 744 F.3d 54 (3d Cir. 2014), the BIA applied its new interpretation to the New York arson statute that is at issue in the instant case. The BIA held that "the omission of the Federal jurisdictional element in § 844(i) from the State statute is not dispositive. The offense in section 150.10 of the New York Penal Law contains all of the other substantive elements that are contained in § 844(i), so it is an aggravated felony." *Id.* at 620.

II. Facts and proceedings below

Petitioner George Luna has been a lawful permanent resident of the United States since 1983, when his parents brought him to this country from the Dominican Republic at the age of nine. Ever since, Luna has lived in Brooklyn, New York. He is a carpenter and an electrician, and he is taking classes at City University of New York toward a degree in civil engineering. He owns his own home, not far from his parents, his brother, his sister, and his niece and nephews. Luna is engaged to be married. His fiancée is a graduate of Columbia University. Luna was her sole source of financial support while she earned a master's degree. They have postponed their wedding plans until they find out whether Luna will be able to stay in the country. 2d Cir. JA 275, 282, 286. He has only one blemish on his record. In 1999, he pled guilty to one count of attempted arson in the third degree, in violation of N.Y. Penal Law §§ 110 and 150.10. He was sentenced to one day of imprisonment and five years of probation. Pet. App. 2a.

In 2006, Luna was returning from a trip to the Dominican Republic when he was charged with inadmissibility as an alien convicted of a crime involving moral turpitude. Pet. App. 2a. An Immigration Judge found him inadmissible on this ground, a conclusion Luna has not further challenged. Pet. App. 2a.

Luna applied for the discretionary relief of cancellation of removal. An Immigration Judge found him ineligible for cancellation of removal under 8 U.S.C.

§ 1229b(a)(3), on the ground that he had been convicted of an aggravated felony. Pet. App. 18a-23a.

The Board of Immigration Appeals dismissed Luna's appeal. Pet. App. 15a-17a. The BIA explained that in *Matter of Bautista* it had already determined that the New York offense of attempted arson in the third degree is an aggravated felony. Pet. App. 16a. The BIA noted that "the sole difference between the federal arson offense set forth at 18 U.S.C. § 844(i) and the New York state offense is that the federal offense has an additional element, namely, that the property must be 'used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.'" Pet. App. 16a (quoting 18 U.S.C. § 844(i)). But because this extra federal element was merely a "jurisdictional element," the BIA held, it could be ignored when comparing the federal and state offenses. Pet. App. 16a.

Luna sought review in the U.S. Court of Appeals for the Second Circuit. After briefing, but before oral argument in Luna's appeal, the Third Circuit vacated the BIA's *Matter of Bautista* decision. Pet. App. 3a; *Bautista v. Attorney Gen.*, 744 F.3d 54 (3d Cir. 2014). The Third Circuit determined that the New York offense does not qualify as an aggravated felony because it lacks the interstate commerce element. Pet. App. 3a; *Bautista*, 744 F.3d at 58-69.

The Second Circuit nevertheless denied Luna's petition for review. Pet. App. 1a-14a. The Second Circuit noted that section 1101(a)(43) sometimes uses "described in" to refer to offenses, and sometimes uses "defined in." Pet. App. 8a-9a. The Second Cir-

cuit inferred that "described in" must be a looser standard than "defined in," and that a state offense identified as "described in" a federal statute "need not reproduce the federal jurisdictional element to have immigration consequences." Pet. App. 9a-10a.

"On the other hand," the Second Circuit continued, "we do not think that this conclusion follows inexorably from the INA's text and structure." Pet. App. 10a. The court pointed out that section 1101(a)(43)'s unnumbered penultimate sentence does not "unequivocally express[ ] Congress's intent to discount federal jurisdictional elements in determining whether a state offense is 'described in' a federal statute." Pet. App. 10a.

After finding the statute ambiguous, the Second Circuit deferred to the BIA's interpretation under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 12a.

SUMMARY OF ARGUMENT

I. The New York offense of arson is not "described in" 18 U.S.C. § 844(i), because it lacks one of section 844(i)'s elements, the interstate commerce element. "Described in," as used in the definition of aggravated felony and throughout the U.S. Code, literally means "described in." It does not mean "described in except for one element." The Court of Appeals erroneously inferred that "described in" is a looser term than "defined in." In fact, the only difference between the two, in this statute and throughout the Code, is that "defined in" refers to definitions, while "described in" refers to matter other than definitions.

Had Congress intended to include state-law arson as an aggravated felony, Congress would have used the word "arson" rather than the phrase "the offense described in" section 844(i). By using generic names (like "murder" and "rape") to refer to some crimes, but citations to federal criminal statutes to refer to others, Congress indicated that in the first category all state offenses that meet the generic definition are aggravated felonies, but that in the second category state offenses are aggravated felonies only where they include all the elements of the specified federal statute.

Congress sometimes includes elements in federal statutes, like a nexus to interstate commerce, in part to ensure its own power to punish an offense, but such elements cannot be ignored just by labeling them "jurisdictional." Like any other elements, they must be proven beyond a reasonable doubt. The government may not parse the elements of a crime according to their purposes or their perceived importance.

Some of the Courts of Appeals have labored under the misimpression that including the interstate commerce element would render the penultimate sentence of section 1101(a)(43) a nullity. But this view is mistaken, because most of the offenses listed in section 1101(a)(43) have no interstate commerce element. Many state offenses qualify as aggravated felonies when "described in" is taken to mean "described in."

II. The government contends that the plain meaning of "described in" would yield an absurd result—

that federal arson, but not state arson, is an aggravated felony. But this result is not absurd. Congress could reasonably have concluded that federal arsons tend to be more serious than state arsons, and that serious state offenses not defined as aggravated felonies are already covered by other provisions of the INA.

III. If section 1101(a)(43) were ambiguous, it would have to be construed against the government. Section 1101(a)(43) has criminal as well as civil applications. Ambiguities must therefore be resolved against the government under the rule of lenity. A word or a phrase in a statute cannot have two different meanings, one in civil cases (because of *Chevron*) and another in criminal cases (because of the rule of lenity). To ensure consistency in interpretation, the rule of lenity applies in both contexts.

Deportation is one of the consequences of an aggravated felony conviction. Even if the statute did not have criminal consequences, therefore, ambiguities would have to be resolved according to the longstanding principle of construing deportation statutes in favor of the alien. This principle, like the other normal tools of statutory construction, comes into play at step one of the *Chevron* analysis, in determining whether the intent of Congress is unambiguous.

In any event, the BIA's interpretation of the statute is patently unreasonable, so it is unworthy of deference for that reason as well.

ARGUMENT

Rather than including the generic term "arson" within the definition of aggravated felony, Congress included "an offense described in" 18 U.S.C. § 844(i). But the New York offense of arson is not "described in" section 844(i), because the New York offense lacks one of the elements required for a conviction under section 844(i). If Congress had wanted to include ordinary state-law arson as an aggravated felony, Congress would have used the word "arson."

The government can find no refuge in the doctrine that statutes should be interpreted to avoid absurd results, because it was quite reasonable for Congress to exclude ordinary state-law arson from the definition of aggravated felony. Nor is the government's view entitled to *Chevron* deference. The statute is not ambiguous, and if it were, it would have to be construed against the government under both the rule of lenity and the principle of construing deportation statutes in favor of the alien.

I. The New York offense of arson is not "described in" 18 U.S.C. § 844(i), because it lacks one of the elements listed in section 844(i).

The text of section 1101(a)(43) makes clear that a state offense is "described in" a federal statute only if the state offense includes all the elements of the federal statute, including an interstate commerce element. By using the phrase "an offense described in" 18 U.S.C. § 844(i), instead of the generic term "arson," Congress indicated that ordinary state-law ar-

son is not an aggravated felony, unlike the many other state offenses Congress referred to by their generic names. The government cannot ignore an element of a federal offense just by labeling the element "jurisdictional."

A. "Described in" means "described in," not "described in except for one element."

In ordinary speech, a concept is "described in" a text only if the text actually depicts that very concept, not some other concept that is similar. Standard dictionaries reflect this usage. *Describe* means "express, explain, set forth, relate, recount, narrate, depict, delineate, portray." *Black's Law Dictionary* 401 (5th ed. 1979). It means "to represent or give an account of in words." *Webster's New Collegiate Dictionary* 307 (1976). As the BIA correctly pointed out in its first *Vasquez-Muniz* opinion, dictionaries refute the government's contention that "described in" means "that which is analogous or similar in nature to that which is being compared." *Vasquez-Muniz*, 22 I. & N. Dec. at 1420.[4]

---

[4] The Fourth Circuit erroneously concluded that two secondary definitions of "describe" found in the American Heritage Dictionary are looser than the primary definition. *See Espinal-Andrades*, 777 F.3d at 168 (citing *The American Heritage Dictionary of the English Language* 490 (5th ed. 2011), and quoting the definitions as "[t]o convey an idea or impression of" and "[t]o trace the form or outline of"). These are the American Heritage Dictionary's second and fourth definitions of "describe." The first definition is identical to the definitions found in other dictionaries: "To give an account of in speech or writing: *describe a sea voyage*." Moreover, when the second and fourth def-

In the INA, Congress used the phrase "described in" in its ordinary sense. *See Lopez*, 549 U.S. at 53 (construing terms in the INA according to their "commonsense conception" and their "everyday understanding"). It means the offense "expressed" in or "set forth" in the specified statute. The offense "described in" 18 U.S.C. § 844(i) is the particular offense set forth in that statute, not a vague category of similar offenses. If a person were to commit an offense similar to the one described in section 844(i) but lacking one of its elements—whether the mental state, the damaging of property, the property's nexus to interstate commerce, or the use of fire or explosives—he would not be committing the offense "described in" section 844(i). *See Jones*, 529 U.S. at 859.

Every use of "described in" in section 1101(a)(43) likewise refers to a federal statute that specifies the elements of a criminal offense. In each instance, the offense "described in" the designated statute is the particular offense whose elements are listed there, not a vague class of similar offenses lacking one ele-

---

initions are read in full, it is clear that they are not any looser than the conventional definition. The full text of the second definition is "[t]o convey an idea or impression of; characterize: *She described her childhood as a time of wonder and discovery.*" This use of "describe" is not a reference to categories of things similar to a childhood or to a time of wonder and discovery; it is a reference to the things themselves. The full text of the fourth definition is "[t]o trace the form or outline of: *describe a circle with a compass.*" This is not a reference to a class of shapes resembling circles or to a class of mathematical instruments resembling compasses, but to circles and compasses. This last sense of "describe" was in any event unlikely to have been intended by Congress.

ment of the designated offense. If "described in" actually meant "described in except for one element," this clear definition of aggravated felony would lose all its clarity, because it would include not just the designated offenses but a nebulous penumbra of similar offenses.

By the same token, the penultimate sentence of section 1101(a)(43) states that the term aggravated felony "applies to an offense *described in* this paragraph whether in violation of Federal or State law" (emphasis added). If "described in" actually meant "described in except for one element," the definition of aggravated felony would become extraordinarily ambiguous.

Indeed, a looser definition of "described in" would wreak havoc on the entire U.S. Code, which relies heavily on the ordinary meaning of the phrase. Just to pick one of thousands of examples, the tax code states that "qualified dividend income" does not include "any dividend *described in* section 404(k)." 26 U.S.C. § 1(h)(11)(B)(ii)(III) (emphasis added). Section 404(k), in turn, provides a list of characteristics such a dividend must have. 26 U.S.C. § 404(k). Tax planning would be impossible under a non-literal definition of "described in," because one could never predict the tax treatment of a dividend with all but one of the required characteristics. If "described in" does not literally mean "described in," the U.S. Code would be strewn with thousands of such Pandora's boxes.

In Title 8 alone, there are 765 instances in which Congress used "described in" to refer to matter in a

statutory provision.[5] Title 8 is just one of 52 titles in the U.S. Code. If "described in" means anything but "described in," we should start preparing for an awful lot of litigation.

The Court of Appeals below drew an erroneous inference from the fact that some subsections of 8 U.S.C. § 1101(a)(43) use the term "described in," while others use the term "defined in." The Court of Appeals mistakenly reasoned that "described in" must mean something less precise than "defined in." Pet. App. 9a-10a.

---

[5] *See* 8 U.S.C. §§ 1101 (67 times), 1102 (3 times), 1105, 1151 (11 times), 1152 (6 times), 1153 (26 times), 1154 (35 times), 1157 (twice), 1158 (6 times), 1160 (8 times), 1182 (81 times), 1182d, 1183a (3 times), 1184 (71 times), 1186a (13 times), 1186b (12 times), 1187 (15 times), 1188 (10 times), 1189 (twice), 1202 (4 times), 1225 (11 times), 1226, 1226a (5 times), 1227 (12 times), 1228 (9 times), 1229 (twice), 1229a (4 times), 1229b (7 times), 1229c (5 times), 1231 (10 times), 1232 (10 times), 1252 (3 times), 1253 (twice), 1254a (3 times), 1254b (twice), 1255 (23 times), 1255a (10 times), 1258, 1281, 1288 (15 times), 1321 (3 times), 1324 (3 times), 1324a (17 times), 1324b (twice), 1324c (twice), 1326 (twice), 1330 (twice), 1356 (14 times), 1357 (twice), 1365a (6 times), 1365b (3 times), 1368 (twice), 1372 (11 times), 1375a (10 times), 1375b (5 times), 1375c (7 times), 1376 (twice), 1378 (3 times), 1379 (twice), 1380, 1381 (twice), 1421 (3 times), 1424 (5 times), 1427, 1430, 1433, 1435, 1438, 1439, 1440, 1440-1 (3 times), 1440f (4 times), 1441 (twice), 1455 (twice), 1457, 1503, 1522 (8 times), 1531 (3 times), 1534 (4 times), 1535, 1536 (twice), 1537 (twice), 1573, 1574 (5 times), 1611, 1612 (41 times), 1613 (8 times), 1615 (twice), 1622 (4 times), 1624, 1631 (3 times), 1632, 1642, 1711 (3 times), 1713, 1721 (3 times), 1722, 1723 (twice), 1724, 1731, 1732, 1733, 1737 (twice), 1751, 1752, 1753, 1761 (twice), 1771, 1776 (13 times).

In fact, however, section 1101(a)(43) uses "defined in" only when referring to a federal statute that explicitly provides a *definition* of a term. *See* subsection B (referring to the definition of "controlled substance" in 21 U.S.C. § 802 and the definition of "drug trafficking crime" in 18 U.S.C. § 924(c)); subsection C (referring to the definitions of "firearm" and "destructive device" in 18 U.S.C. § 921 and to the definition of "explosive materials" in 18 U.S.C. § 841(c)); subsection F (referring to the definition of "crime of violence" in 18 U.S.C. § 16).

This use of "defined in" is standard throughout the U.S. Code, which consistently uses "defined in" to refer to a definition. Examples can be found on virtually every page. Biofuels research grants are available to "a part B institution (as *defined in* section 1061 of Title 20)." 42 U.S.C. § 17034(a)(2) (emphasis added). If one turns to 20 U.S.C. § 1061, one finds the definition of "part B institution." The Securities and Exchange Commission is prohibited from requiring the registration of "any security-based swap agreement (as *defined in* section 78c(a)(78) of this title)." 15 U.S.C. § 77b-1(b)(2) (emphasis added). If one turns to that provision, one finds the definition of "security-based swap agreement."

The use of "defined in" to refer to definitions is recommended by the drafting manuals published by the legislative counsel's offices of both houses of Congress. *See* U.S. Senate Office of the Legislative Counsel, *Legislative Drafting Manual* 22 (1997); U.S. House of Representatives Office of the Legislative

Counsel, *House Legislative Counsel's Manual on Drafting Style* 31 (1995).

In the U.S. Code, "described in" is thus not a looser term than "defined in." The difference between them is that they refer to different things. The Code uses "defined in" to refer to definitions; it uses "described in" to refer to matter other than definitions. A nice example of this distinction can be found in 8 U.S.C. §§ 1612 and 1622, both of which include a reference to "a veteran (as *defined in* section 101, 1101, or 1301, or as *described in* section 107 of Title 38)" (emphases added). The first three of the statutes cited in the parenthetical include definitions of "veteran." 38 U.S.C. §§ 101(2), 1101(1), 1301. The last does not. Rather, it describes certain kinds of military service deemed not to constitute active service. 38 U.S.C. § 107.

This distinction is faithfully followed in 8 U.S.C. § 1101(a)(43), which uses "defined in" to point to definitions, and uses "described in" when referring to statutes that describe crimes by stating their elements. That is the only difference between the two phrases.

B. Congress's use of the phrase "an offense described in" 18 U.S.C. § 844(i), rather than the generic term "arson," indicates that Congress did not intend ordinary state-law arson to be an aggravated felony.

If Congress had intended to include ordinary state-law arson as an aggravated felony, subsection

E would have used the generic term "arson," rather than stating "an offense described in" 18 U.S.C. § 844(i). This was the method Congress used in subsection A for murder, rape, and sexual abuse of a minor, in subsection G for theft and burglary, and in several other subsections that likewise identify offenses by their generic names. "Where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (citation, bracket, ellipsis, and internal quotation marks omitted).

By using generic names to refer to some crimes, but citations to the U.S. Code to refer to others, Congress indicated that in the first category all state offenses that meet the generic definition are aggravated felonies, but that in the second category state offenses are aggravated felonies only where they include all the elements of the specified federal statute. "We cannot imagine that Congress took the trouble to incorporate its own statutory scheme of felonies and misdemeanors if it meant courts to ignore it." *Lopez*, 549 U.S. at 58.

The government suggests (BIO 15-16) that "arson" would have been too vague a word for Congress to use, because of ostensible variations among states in the elements of arson. In fact, however, Congress often uses the word "arson" when it wants to refer generically to arson. In the Armed Career Criminal Act, for example, Congress imposed enhanced pun-

ishment on certain defendants with three or more state or federal "violent felony" convictions. 18 U.S.C. § 924(e)(1). The Act defines "violent felony" to include "arson." 18 U.S.C. § 924(e)(2)(B)(ii).[6] Likewise, one of the federal racketeering statutes criminalizes a range of activities relating to "arson in violation of the laws of the State in which committed." 18 U.S.C. § 1952(b). Under its authority to regulate Indian country, Congress has prohibited several generically-named crimes, including "arson." 18 U.S.C. § 1153(a). These examples suggest that Congress is hardly reluctant to use the word "arson" in a generic sense.

Indeed, the word "arson" appears throughout the U.S. Code. *See, e.g.*, 18 U.S.C. § 1111(a) (defining first degree murder to include murder committed in the perpetration of "any arson"); 18 U.S.C. § 1961(1)(A) (defining "racketeering activity" to include "any act or threat involving ... arson"); 18 U.S.C. § 1461 (prohibiting the mailing of any "matter of a character tending to incite arson"); 18 U.S.C. § 846(b) (authorizing the Attorney General "to establish a national repository of information on incidents involving arson"); 15 U.S.C. § 2220(1) (directing the Federal Emergency Management Agency to develop "arson detection techniques"). When Congress wants to say "arson," it says "arson."

Moreover, the supposed ambiguity of generic names for crimes did not stop Congress from using

---

[6] The Armed Career Criminal Act's reference to arson appears just before the residual clause the Court found unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

many other generic names for crimes in the definition of aggravated felony, including "murder," "rape," "sexual abuse," "theft," "burglary," "prostitution," "fraud," "deceit," "bribery," "counterfeiting," "forgery," "obstruction of justice," "perjury," "attempt," and "conspiracy." If Congress had wanted to reach all state arsons as aggravated felonies, as it did for these other crimes, it would have used the word "arson."

But Congress did not say "arson." Instead, Congress said "an offense described in" 18 U.S.C. § 844(i), a statute that "is not soundly read to make virtually every arson in the country a federal offense," *Jones*, 529 U.S. at 859, because it prohibits the burning only of property "used in interstate or foreign commerce." The offense described in section 844(i) is federal arson, not generic arson.[7]

Using the word "arson" would not have been the only way to include ordinary state-law arson in the definition of aggravated felony. Congress had two other options that would have been just as easy, if that is what Congress had wished to do.

---

[7] The Court of Appeals below speculated that perhaps Congress did not use the word "arson" because Congress also wished to include several explosives offenses in 18 U.S.C. § 844 other than arson. Pet. App. 9a n.2. But if Congress had wished to include state-law arson along with these other federal explosives offenses, Congress would most naturally have provided that aggravated felonies include "arson" as well as the explosives offenses "described in" 18 U.S.C. § 844. This was the method Congress used, for example, in subsection K, which provides that aggravated felonies include managing a "prostitution business" as well as the prostitution-related offenses "described in" several specified federal statutes.

First, subsection E could have said "a Federal offense described in" one of the specified federal statutes *"or a State offense that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed."* This was the method Congress used in 18 U.S.C. § 3142(e)(2)(A), which requires pretrial detention where a "person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed." *See also* 18 U.S.C. § 3142(f)(1)(D) (using the same method); 18 U.S.C. § 5032 (providing that a juvenile shall be tried as an adult if he "has previously been found guilty of an act which if committed by an adult would have been one of the offenses set forth in this paragraph or an offense in violation of a State felony statute that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed").[8]

Second, the penultimate sentence of section 1101(a)(43) could simply have said that state offenses count as aggravated felonies regardless of whether an interstate commerce element is present.

But Congress chose none of these options. Instead, Congress chose the one option under which ordinary state-law arson is *not* an aggravated felony. Con-

---

[8] Congress enacted the first two of these provisions in the Bail Reform Act of 1984, Pub. L. No. 98-473, § 203(a), 98 Stat. 1976. Congress was thus well aware of this drafting technique when it defined aggravated felony several years later.

gress's use of "an offense described in" 18 U.S.C. § 844(i), rather than "arson," is comprehensible only as a decision to treat arson differently from the generically-named offenses.

Treating generic arson as an aggravated felony would yield an especially incongruous result, because many states punish as misdemeanors some arsons that would be felonies under 18 U.S.C. § 844(i) if the damaged property had a sufficient nexus to interstate commerce. *See* Ariz. Rev. Stat. § 13-1703(B); Ark. Stat. § 5-38-301(b)(1); Colo. Rev. Stat. § 18-4-103(3); Del. Code tit. 11, § 804(b)(1); D.C. Code § 22-303; Fla. Stat. § 806.031(1); Iowa Code § 712.4; Md. Code, Criminal Law § 6-105(c); Mich. Stat. § 750.77(3); Minn. Stat. § 609.5632; Mo. Rev. Stat. § 569.053(2) (effective Jan. 1, 2017); Neb. Rev. Stat. § 28-504(3); N.H. Rev. Stat. § 634:1(IV); N.M. Stat. § 30-17-5(B); N.Y. Penal Law. § 150.01; Ohio Rev. Code § 2909.03(B)(2)(a); Or. Rev. Stat. § 164.335(2); S.C. Code § 16-11-150(a); Tenn. Code § 39-14-304(b); Utah Code § 76-6-102(5); Va. Code. § 18.2-80; Wash. Rev. Code § 9A.48.050(2); Wyo. Stat. § 6-3-104(b). If Congress meant to classify all these misdemeanors as aggravated felonies, Congress would have said so. *See Carachuri-Rosendo v. Holder*, 560 U.S. 563, 574-75 (2010); *Lopez*, 549 U.S. at 54. In fact, however, Congress said the opposite. Rather than including generic arson as an aggravat-

ed felony, Congress included only the offense described in 18 U.S.C. § 844(i).[9]

C. An element of an offense cannot be ignored just because the element ensures that Congress has the power to punish the offense.

Federal criminal statutes sometimes include elements that, among other purposes, ensure that Congress has the power to punish the offense. A nexus to interstate commerce is one such element, but it is not the only one. These elements cannot be ignored by labeling them "jurisdictional."

For instance, subsection E defines as an aggravated felony "an offense described in" 18 U.S.C. § 844(f), which proscribes the destruction of property "owned or possessed by ... the United States." Ownership by the United States is an element of the crime in part

---

[9] The legislative history of section 1101(a)(43) confirms this conclusion. The definition of "aggravated felony" first appeared as part of the Anti-Drug Abuse Act of 1988. It included only murder, drug trafficking, and firearms trafficking. Pub. L. No. 100-690, § 7342, 102 Stat. 4469-70. The penultimate sentence was added as part of the Immigration Act of 1990, which also modified the drug trafficking offenses and added the provisions for crimes of violence and money laundering. Pub. L. No. 101-649, § 501, 104 Stat. 5048. Most of the rest of section 1101(a)(43), including subsection E, was added in the Immigration and Nationality Technical Corrections Act of 1994. Pub. L. No. 103-416, § 222, 108 Stat. 4320-22. Congress thus enacted the reference to "an offense described in" 18 U.S.C. § 844(i) at the very same time that it enacted the references to several of the offenses it chose to identify by their generic names, a disparity that would not exist if Congress intended generic arson to be an aggravated felony.

to ensure that Congress has the power to punish the offense, just like the nexus to interstate commerce is an element of federal arson in part to ensure congressional power. If a person destroyed property owned and possessed by his brother-in-law, he would surely not be committing the offense "described in" 18 U.S.C. § 844(f), precisely because of the absence of this element. If this element were ignored in determining whether a state offense is an aggravated felony, it would be an aggravated felony to destroy property owned by anyone.

Likewise, subsection H defines as an aggravated felony "an offense described in" 18 U.S.C. § 876, which forbids the sending of threatening communications "by the Postal Service." The Postal Service element is in the statute in part to ensure that Congress has the power to punish the offense. If a person sent a threatening communication by Federal Express or by email, he would surely not be committing the offense "described in" 18 U.S.C. § 876, again because of the absence of this element. If this element were ignored in determining whether a state offense is an aggravated felony, it would be an aggravated felony to send a threatening communication by any means at all.

By including these two relatively narrow federal offenses in the definition of aggravated felony, Congress clearly did not mean to include all vandalism and all threats. Congress meant to include only vandalism and threats that satisfy each of the elements of the specified federal statutes, including the ele-

ment that was placed in the statute in part to ensure that Congress has the power to punish the offense.

The same is true for the offense of federal arson. A person who burns property with no nexus to interstate commerce is not committing the offense "described in" 18 U.S.C. § 844(i), because of the absence of this element. Congress meant to include as aggravated felonies only those arsons that satisfy each of the elements of section 844(i).

As these examples show, there are no second-class elements of federal criminal statutes. The interstate commerce element is "described in" section 844(i) just as fully as the other elements of federal arson. The government may not parse the elements of a crime according to their purposes or their perceived importance. *See United States v. Gaudin*, 515 U.S. 506, 511-23 (1995). Rather, the government must prove an interstate commerce element beyond a reasonable doubt, just like it must prove any other element. *United States v. Bass*, 404 U.S. 336, 347 (1971) ("the present conviction must be set aside because the Government has failed to show the requisite nexus with interstate commerce"); *Jones*, 529 U.S. at 859 (reversing an arson conviction where the government failed to prove that the property burned had a sufficient connection to interstate commerce). The government may not ignore an element of a crime just by labeling the element "jurisdictional."

D. Including the interstate commerce element does not render the penultimate sentence of section 1101(a)(43) a nullity, because most of the offenses listed in section 1101(a)(43) have no interstate commerce element.

Some of the Courts of Appeals have labored under the misimpression that a straightforward interpretation of "described in" would render the penultimate sentence of 8 U.S.C. § 1101(a)(43) a nullity, on the theory that few if any state crimes require a connection to interstate commerce. *See Espinal-Andrades*, 777 F.3d at 168-69; *Nieto Hernandez*, 592 F.3d at 685-86; *Negrete-Rodriguez*, 518 F.3d at 502; *Spacek*, 688 F.3d at 538-39; *Castillo-Rivera*, 244 F.3d at 1023. But this view is clearly mistaken, because most of the offenses listed in section 1101(a)(43) have no interstate commerce element. The penultimate sentence merely says that state offenses can qualify as aggravated felonies. It does not say that every single subsection of section 1101(a)(43) must include state offenses.

Under a straightforward interpretation of "described in," many state offenses still qualify as aggravated felonies. These include all that fit within their generic names: murder, rape, and sexual abuse of a minor (subsection A); theft and burglary (subsection G); offenses relating to prostitution (subsection K(i)); offenses involving fraud and deceit (subsection M(i)); offenses relating to failure to appear (subsections Q and T); offenses relating to commercial bribery, counterfeiting, forgery, and trafficking

in vehicles with altered ID numbers (subsection R); and offenses relating to obstruction of justice, perjury and bribery of a witness (subsection S).

Also qualifying as aggravated felonies are the state offenses incorporating terms "defined in" federal statutes. These include drug trafficking (subsection B); trafficking in firearms, destructive devices, and explosive materials (subsection C); and crimes of violence (subsection F).

Also qualifying as aggravated felonies are the state offenses "described in" federal statutes that do not contain interstate commerce elements. These include 18 U.S.C. §§ 922(o), 922(p), 922(r), and 924(h) (referred to in subsection E(ii)); parts of 26 U.S.C. § 5861 (referred to in subsection E(iii)); 18 U.S.C. § 1955 (referred to in subsection J); 18 U.S.C. §§ 1581-1585 and 1588-1590 (referred to in subsection K(iii)); 18 U.S.C. §§ 793, 798, 2153, 2381, and 2382 (referred to in subsection L(i)); 50 U.S.C. § 3121 (referred to in subsections L(ii) and L(iii)); 8 U.S.C. §§ 1324(a)(1)(A) and 1324(a)(2) (referred to in subsection N); 8 U.S.C. §§ 1325(a) and 1326 (referred to in subsection O); and 18 U.S.C. § 1546(a) (referred to in subsection P).

The penultimate sentence is thus far from a nullity—indeed, it still covers a great number of state offenses—when "described in" is taken to mean "described in."[10]

---

[10] For the same reason, the penultimate sentence also covers a great many foreign offenses—all those identified by their generic names, all those incorporating terms "defined in" federal

In the Court of Appeals below, the government argued that a literal interpretation of subsection E would render meaningless the clause of 8 U.S.C. § 1231(a)(4)(B)(ii) that authorizes the Attorney General to remove an alien serving a state prison sentence "for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title)." This clause assumes that *some* state offenses must be listed in subsection E, but the government errs twice in contending that arson must be one of them. First, section 1231(a)(4)(B)(ii) by its own terms applies only to "a nonviolent offense," but the offense described in 18 U.S.C. § 844(i) is a violent offense. *See, e.g., United States v. Mitchell*, 23 F.3d 1, 2 & n.3 (1st Cir. 1994). Second, subsection E lists many federal criminal statutes, several of which do not contain interstate commerce elements. These include 18 U.S.C. § 922(o) (prohibiting the possession and transfer of machine guns), 18 U.S.C. § 922(p) (prohibiting the possession and transfer of firearms not detectable by metal detectors); 18 U.S.C. § 922(r) (prohibiting the assembly of certain firearms identical to prohibited firearms); 18 U.S.C. § 924(h) (prohibiting the transfer of firearms to be used in crimes of violence or drug trafficking); and 26 U.S.C. § 5861 (prohibiting a wide range of firearms-related conduct, most of which has no interstate commerce element). These (or at least the nonviolent ones among them) are the offenses referred to in the clause of 8 U.S.C. § 1231(a)(4)(B)(ii) on which the government

---

statutes and all those "described in" federal statutes without interstate commerce elements.

relies. This clause is thus hardly meaningless when "described in" is taken to mean "described in."

II. The doctrine that statutes should not be interpreted to produce absurd results has no bearing on this case, because it was quite reasonable for Congress to exclude ordinary state-law arson from the definition of aggravated felony.

The government contends (BIO 12-14) that the plain meaning of "described in" would yield an absurd result—that federal arson, but not state arson, is an aggravated felony. But this result is not absurd at all.

To begin with, it takes an extraordinary showing to displace the text of a statute on the ground that the text would produce absurd results. "[T]he principle is to be applied to override the literal terms of a statute only under rare and exceptional circumstances," the Court has cautioned. "[T]o justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general moral or common sense." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). A court must be convinced that "[i]t was unmistakably *not* Congress' intention" to accomplish what the words of the statute say. *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 453 (1989). As Chief Justice Marshall put it in the canonical statement of the absurdity doctrine, the case "must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the applica-

tion." *Sturges v. Crowninshield*, 17 U.S. 122, 203 (1819).

The government cannot come close to satisfying this high standard. Congress could reasonably have determined that federal arsons tend to be more serious than state arsons, and that serious state offenses not defined as aggravated felonies are already covered by other provisions of the INA.

A. It would not have been absurd for Congress to determine that some federal offenses tend to be more serious than their state variants.

In determining which offenses to classify as aggravated felonies, Congress had to make a judgment as to whether whole categories of crimes are sufficiently grave to warrant the "harshest deportation consequences," *Carachuri-Rosendo*, 560 U.S. at 566, such as mandatory removal. For some crimes—those referred to by their generic names, such as murder and rape—Congress could reasonably have determined that both their federal and state versions are sufficiently serious. For other crimes—those referred to as "described in" a section of the U.S. Code containing an interstate commerce element—Congress could reasonably have determined that the state variants tend to be less heinous than the federal variants, and that there are enough minor state convictions that the entire category should not be classified as an aggravated felony.

Arson is a perfect example. Minor arsons are normally prosecuted by the states, not by the federal

government. Some state arsons are even misdemeanors. *See* page 25 *supra*. Federal arson cases tend to be more serious.[11] Susan R. Klein et al., *Why Federal Prosecutors Charge: A Comparison of Federal and New York State Arson and Robbery Filings, 2006-2010*, 51 Hous. L. Rev. 1381, 1406 (2014) ("higher dollar value [arson] cases are more likely to be brought under federal, as opposed to New York State, statutes"); *id.* at 1416-19 (regression analysis showing that an arson case is much more likely to be charged as federal crime where the victim is a minor, where the defendant uses a weapon, where the defendant has several prior arrests for violent offenses, or where the arson is part of a conspiracy).

This pattern, in which federal arsons tend to be more serious than state arsons, was almost certainly intended by Congress. The federal statutes criminalizing arson and the use of explosives were first enacted as part of the Organized Crime Control Act of 1970, because Congress was particularly concerned with bombings by radical groups of the era. John Panneton, *Federalizing Fires: The Evolving Federal Response to Arson Related Crimes*, 23 Am. Crim. L. Rev. 151, 192-93 (1985). Congress did not enact the federal arson statute in order to duplicate state prosecutions of minor arsons. The point was to put the weight of the Justice Department behind the major cases.

---

[11] This case is a good example. A violation of the federal arson statute carries a minimum sentence of five years in prison. 18 U.S.C. § 844(i). George Luna was sentenced to one day in prison. Pet. App. 2a.

To be sure, some state arsons are more serious, and occasional federal arsons may be minor. But the question is not whether Congress designed a perfect mechanism for separating major from minor arsons. The question is whether a literal reading of the statute would be too absurd to contemplate—whether it "would be so monstrous, that all mankind would, without hesitation, unite in rejecting" it. *Sturges*, 17 U.S. at 203. It would not be.

The same is true of the other crimes section 1101(a)(43) refers to as "described in" federal statutes containing interstate commerce elements. Congress could reasonably have determined that these crimes tend to be more serious when conducted on a national scale than on a local scale. It would not have been absurd for Congress to suppose, for example, that interstate racketeering is worse, all else equal, than local racketeering. *See* subsection J (defining as an aggravated felony "an offense described in" 18 U.S.C. § 1962). It would not have been absurd for Congress to conclude that distributing child pornography through interstate networks is worse than handing child pornography to one's neighbor. *See* subsection I (defining as an aggravated felony "an offense described in" 18 U.S.C. § 2252). It would not have been absurd for Congress to determine that more harm is done when illegal firearms circulate in national markets than when they circulate only in local markets. *See* subsection E(ii) (defining as an aggravated felony "an offense described in" 18 U.S.C. § 922(g)). Read literally, to include interstate commerce elements, these provisions yield consequences that are quite sensible. They are certainly

not so absurd that Congress must be presumed not to have intended them.

These consequences are even more reasonable when one considers that the statutory definition of aggravated felony also includes a backstop in subsection F, which classifies as an aggravated felony "a crime of violence ... for which the term of imprisonment [is] at least one year." Many state offenses serious enough to warrant deportation, but not encompassed within one of the other subsections, will fall within this category. It would hardly have been absurd for Congress to take this backstop into account in deciding which *other* state offenses to classify as aggravated felonies.

B. It would not have been absurd for Congress to take into account that serious state offenses not defined as aggravated felonies are already covered by other provisions of the INA.

The commission of an aggravated felony is but one of several grounds for deportation and other adverse immigration consequences. It would not have been absurd for Congress to take into account that serious state offenses not defined as aggravated felonies would already fall within one of these other grounds.

For example, a person who is convicted of an aggravated felony is deportable, 8 U.S.C. § 1227(a)(2)(A)(iii), but so is a person who is convicted of a crime of moral turpitude under certain frequently-met conditions, § 1227(a)(2)(A)(i), a person who is convicted of two crimes of moral turpitude,

§ 1227(a)(2)(A)(ii), a person who flees from an immigration checkpoint, § 1227(a)(2)(A)(iv), a person who fails to register as a sex offender, § 1227(a)(2)(A)(v), a person convicted of virtually any offense relating to controlled substances, § 1227(a)(2)(B), a person convicted under virtually any law involving firearms, § 1227(a)(2)(C), a person convicted of any of several offenses involving national security, § 1227(a)(2)(D), and a person convicted of a crime of domestic violence or a crime against children, § 1227(a)(2)(E).

It would not have been absurd—indeed it would have been eminently reasonable—for Congress to take into account these additional grounds for deportation and other adverse immigration consequences when Congress determined which state offenses to classify as aggravated felonies. For instance, any state firearm offense serious enough to warrant deportation would render its perpetrator deportable under section 1227(a)(2)(C)'s separate ground for firearm offenses. State arsons serious enough to warrant deportation would be crimes of moral turpitude likely warranting deportation on that ground alone. *See, e.g.*, *Vuksanovic v. Attorney General*, 439 F.3d 1308, 1311 (11th Cir. 2006). Congress could reasonably have determined that there was no need to classify *all* state firearm offenses or *all* state arsons as aggravated felonies, because the more serious state offenses were already covered by other provisions.

Moreover, many of the adverse immigration consequences that flow from the commission of an aggravated felony involve ineligibility for discretionary

relief, such as asylum or cancellation of removal. *Moncrieffe*, 133 S. Ct. at 1682; *Carachuri-Rosendo*, 560 U.S. at 581. It would not have been absurd—again, it would have been quite reasonable—for Congress to expect that the Attorney General would take an alien's criminal record into account in deciding whether to grant discretionary relief, even if the alien's criminal record does not include an aggravated felony.

For these reasons, a literal interpretation of the statute produces results that are quite sensible. At the very least, the results are not so absurd "as to shock the general moral or common sense." *Crooks*, 282 U.S. at 60.

III. If the statute were ambiguous, it would have to be construed against the government under both the rule of lenity and the principle of construing ambiguities in deportation statutes in favor of the alien.

Section 1101(a)(43) is not ambiguous, so there is no occasion to employ an ambiguity-resolving interpretive canon. But if the statute were ambiguous, the BIA's interpretation would not be entitled to *Chevron* deference. First, because the statute has not just civil but also criminal applications, the rule of lenity applies, to ensure that the statute is interpreted consistently in both contexts. Second, because deportation is one of the consequences of an aggravated felony conviction, the statute must be construed in George Luna's favor under the longstanding presumption that deportation statutes are con-

strued in favor of the alien. Finally, the BIA's interpretation of the statute is in any event unreasonable, so it is unworthy of deference on that ground as well.

A. Because this statute has criminal applications as well as civil applications, any ambiguities must be resolved against the government under the rule of lenity.

Section 1101(a)(43)'s definition of aggravated felony has criminal applications. It is a crime to assist an inadmissible alien to enter the United States—if the alien was convicted of an aggravated felony. 8 U.S.C. § 1327. It is a crime for an alien to disobey an order of removal—if the alien was convicted of an aggravated felony. 8 U.S.C. § 1253(a)(1). A removed alien who reenters the United States can be imprisoned for two years, 8 U.S.C. § 1326(a), but if he has been convicted of an aggravated felony, the maximum sentence is twenty years, § 1326(b)(2).

Section 1101(a)(43)'s definition of aggravated felony also has civil applications. A person convicted of an aggravated felony can be deported, 8 U.S.C. § 1227(a)(2)(A)(iii), and is ineligible for cancellation of removal, § 1229b(a)(3), among other noncriminal consequences.

Because the statute has both criminal and civil applications, ambiguities must be resolved against the government under the rule of lenity. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncrimi-

nal context, the rule of lenity applies."); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) (plurality opinion) ("although it is a tax statute that we construe now in a civil setting, the NFA has criminal applications .... It is proper, therefore, to apply the rule of lenity ...."); *id.* at 519 (Scalia, J., concurring in the judgment) (agreeing with the application of the rule of lenity); *Maracich v. Spears*, 133 S. Ct. 2191, 2209 (2013) (noting that the rule of lenity would be applied to a statute authorizing civil remedies if the statute were ambiguous, because the statute also has criminal applications); *id.* at 2222 (Ginsburg, J., dissenting) (finding the statute ambiguous and applying the rule of lenity); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011) (noting that the rule of lenity applies "when a statute with criminal sanctions is applied in a noncriminal context").

No other conclusion is possible. It would be impossible for a word or a phrase in a statute to have two different meanings, one in civil cases (because of *Chevron*) and another in criminal cases (because of the rule of lenity). *United States v. Santos*, 553 U.S. 507, 522 (2008) (plurality opinion) (rejecting the possibility of "giving the same word, *in the same statutory provision*, different meanings *in different factual contexts*"). To ensure that statutes are interpreted consistently in different kinds of cases, "[i]t is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though another of the statute's applications, standing alone, would not support the same limitation. The lowest common denomina-

tor, as it were, must govern." *Clark v. Martinez*, 543 U.S. 371, 380 (2005).

Nor would it be possible to apply *Chevron* deference across the board, to criminal as well as civil applications of a statute, because "criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014). Deference in criminal cases "would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring in the judgment). Worse, deference to the executive branch in criminal cases would "collide with the norm that legislatures, not executive officers, define crimes." *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., respecting the denial of certiorari). There can be no crimes lurking unexpressed in the U.S. Code. *United States v. Hudson*, 11 U.S. 32, 34 (1812). Whether a person spends twenty years in prison cannot depend on the unpredictably changing views of agency officials.

Nor would the application of *Chevron* deference in criminal cases be consonant with the reasoning underlying *Chevron*. In civil cases, resolving an ambiguity in a statute requires a policy choice, one which Congress delegated to agency administrators rather than to the courts. *Chevron*, 467 U.S. at 864-66; *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2214 (2014) (Roberts, C.J., concurring in the judgment) ("Courts defer to an agency's reasonable construction of an ambiguous statute because we presume that

Congress intended to assign responsibility to resolve the ambiguity to the agency."). In criminal cases, however, neither agencies nor courts have any authority to make that policy choice, because all authority over the definition of crimes belongs to the legislature. "*Chevron* describes how judges and administrators divide power. But power to define crimes is not theirs to divide." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 732 (6th Cir. 2013) (Sutton, J., concurring).

This principle applies to the interpretation of "hybrid" statutes—statutes that carry "civil *and* criminal penalties," *id.* at 730—regardless of whether the statutes are labeled as "criminal" statutes or as some other kind, and regardless of whether they happen to be located in Title 18 or in some other Title of the U.S. Code. *See, e.g.*, *Thompson/Center*, 504 U.S. at 518 (applying the rule of lenity to a tax statute in Title 26); *Kasten*, 131 S. Ct. at 1336 (noting that the rule of lenity would apply to the Fair Labor Standards Act in Title 29 if it were ambiguous). Hybrid statutes are governed by the rule of lenity to ensure that they are interpreted consistently in different factual situations, not because of any formalistic concern about whether a statute has been labeled "criminal" or assigned to Title 18. *Thompson/Center*, 504 U.S. at 518 n.10 (rejecting the notion that "in order for the rule of lenity to apply, the statute must be contained in the Criminal Code").

The situation is different where Congress, by statute, makes it a crime to violate an agency regulation. *Whitman*, 135 S. Ct. at 353 (Scalia, J., re-

specting the denial of certiorari) ("Undoubtedly Congress may make it a crime to violate a regulation, but it is quite a different matter for Congress to give agencies—let alone for us to *presume* that Congress gave agencies—power to resolve ambiguities in criminal legislation.") (citation omitted). For example, the Court has deferred to an SEC rule in a criminal case, *United States v. O'Hagan*, 521 U.S. 642, 673 (1997), where Congress explicitly made it a crime to violate the relevant SEC rules, 15 U.S.C. §§ 78ff(a), 78n(e). The Court has likewise deferred to an Interior Department regulation implementing a provision of the Endangered Species Act capable of criminal enforcement, *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 704 n.18 (1995), where Congress explicitly made it a crime to violate the relevant regulations, 16 U.S.C. § 1540(b)(1).

But this case is nothing like *O'Hagan* or *Sweet Home Chapter*, because this case does not involve any delegation by Congress of authority to DHS to issue regulations with criminal consequences. Here, the BIA has simply interpreted a statute that has both criminal and civil applications. When such a hybrid statute is ambiguous, the appropriate canon of construction is the rule of lenity, not *Chevron* deference.

B. Because deportation is one of the consequences of an aggravated felony conviction, ambiguities in the statute must be construed in favor of the alien.

Deportation is one of the consequences of an aggravated felony conviction. 8 U.S.C. § 1227(a)(2)(A)(iii). Even if section 1101(a)(43) did not have criminal applications, therefore, ambiguities would still have to be interpreted in George Luna's favor, under "'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)); *see also Kawashima v. Holder*, 132 S. Ct. 1166, 1176 (2012) (noting that the Court has "construed ambiguities in deportation statutes in the alien's favor"); *INS v. Errico*, 385 U.S. 214, 225 (1966) (where deportation is a consequence, "the doubt should be resolved in favor of the alien"); *Costello v. INS*, 376 U.S. 120, 128 (1964) (describing this presumption in favor of the alien as required by "accepted principles of statutory construction"); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("because deportation is a drastic measure .... we will not assume that Congress meant to entrench on [the alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used").

This principle, like the other normal principles of statutory construction, comes into play at step one of the *Chevron* analysis, in determining whether the

intent of Congress is unambiguous. *St. Cyr*, 533 U.S. at 320 n.45 ("We only defer, however, to agency interpretations of statutes that, applying the normal 'tools of statutory construction,' are ambiguous.") (quoting *Chevron*, 467 U.S. at 843 n.9); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment) (courts "accept only those agency interpretations that are reasonable in light of the principles of construction courts normally apply"). This use of standard principles of statutory construction to resolve ambiguities at step one of *Chevron* best respects the intent of Congress, because "Congress legislates with knowledge of our basic rules of statutory construction." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991).

Where the meaning of a statute becomes clear by applying one of the standard principles of statutory interpretation, there is no occasion for proceeding to step two of *Chevron*. The inquiry ends at step one. *See Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009) (applying the presumption against preemption rather than deferring to the agency's view in favor of preemption); *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) (applying the presumption against implied rights of action rather than deferring to the agency's view in favor of an implied right of action); *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (applying the presumption against reaching difficult constitutional questions rather than deferring to the agency's view that Congress had legislated close to the outer limit of its power).

The Court of Appeals below followed circuit precedent holding that *Chevron* deference trumps the principle of construing deportation statutes in favor of the alien. Pet. App. 12a n.4 (citing *Adams v. Holder*, 692 F.3d 91, 107 (2d Cir. 2012)). But the Second Circuit's view is mistaken, because it would render the principle a dead letter. In deportation cases, the alien's adversary is always the agency that interprets the immigration statute. If ambiguities in the statute were construed in favor of the agency rather than the alien, there would be no cases in which the principle could operate. The Second Circuit worries that applying the principle "would supplant the application of *Chevron* in the immigration context." *Ruiz-Almanzar v. Ridge*, 485 F.3d 193, 198 (2d Cir. 2007). But this worry is unfounded, for two reasons. First, the principle does not supplant *Chevron*; it applies within the *Chevron* framework. Second, the principle does not apply in all immigration cases; it applies only where deportation would be a consequence. In other immigration matters the BIA is entitled to deference when it reasonably interprets ambiguities in the INA.[12]

---

[12] The principle of construing deportation statutes in favor of the alien has not arisen in any of the Court's cases discussing *Chevron* deference to the BIA, either because the case did not involve deportation, *Cuellar de Osorio*, 134 S. Ct. at 2202, because the BIA was not entitled to deference, *Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015); *Negusie v. Holder*, 555 U.S. 511, 521-23 (2009); *Judulang v. Holder*, 132 S. Ct. 476, 483 n.7 (2011), or because the alien did not claim the benefit of the principle, *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011 (2012); *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999).

Section 1101(a)(43) should thus be construed against the government if it is ambiguous.

C. The BIA is not entitled to *Chevron* deference in any event, because its interpretation of section 1101(a)(43) is unreasonable.

Even if section 1101(a)(43) were ambiguous, and even if it did not have criminal applications, and even if deportation were not a consequence, the BIA would still not be entitled to deference, because its interpretation of the statute is patently unreasonable.

The BIA first interpreted the statute correctly in *In re Vasquez-Muniz*, 22 I. & N. Dec. 1415 (BIA 2000). The BIA carefully examined the use of the phrase "described in" in dictionaries and throughout the U.S. Code. *Id.* at 1421. The BIA observed that in other statutes, when Congress wished to exclude "jurisdictional elements," it did so explicitly. *Id.* at 1422. The BIA refuted the government's argument that a literal reading of "described in" would render the penultimate sentence a nullity. *Id.* at 1423.

The BIA flip-flopped thirteen months later. *In re Vasquez-Muniz*, 23 I. & N. Dec. 207 (BIA 2002). In the interim, the statute had not changed. The BIA had not acquired any new expertise. Rather, the BIA simply replaced a well-reasoned opinion with a poorly-reasoned one that reached the opposite result.

The BIA's second opinion rests entirely on three basic mistakes.

First, the BIA erroneously found that "if state crimes must include a federal jurisdictional element in order to be classified as aggravated felonies, then virtually no state crimes would ever be included." *Id.* at 211. But this is a basic factual error, as we showed above at pages 29-30. Most of the offenses listed in section 1101(a)(43) have no interstate commerce element. Under the BIA's initial correct reading of the statute, all the state offenses referred to by their generic names are aggravated felonies, as are all the state offenses incorporating terms "defined in" federal statutes, as are all the state offenses "described in" federal statutes without interstate commerce elements.

Second, the BIA erroneously found that the reference to state convictions in 8 U.S.C. § 1231(a)(4)(B)(ii) "would be superfluous" unless the interstate commerce element were ignored. *Vasquez-Muniz*, 23 I. & N. Dec. at 211. This is another basic mistake, as we showed above at page 31. This reference to state convictions would not be superfluous, because it would encompass convictions under several statutes that do not include interstate commerce elements.

Third, the BIA erroneously found that because foreign statutes lack interstate commerce elements, the penultimate sentence's reference to foreign convictions would be a nullity unless the interstate commerce element is ignored. *Id.* at 211-12. But this is a simple factual error as well, as we showed above at page 30 n.10, because most of the offenses listed in section 1101(a)(43) do not include an interstate

commerce element. Under the BIA's initial correct reading of the statute, a great many foreign offenses are aggravated felonies.

These three mistakes are the entirety of the BIA's reasoning in its second *Vasquez-Muniz* opinion. The BIA did not even bother to explain why it rejected the extensive research and thorough analysis of its first *Vasquez-Muniz* opinion. While an agency may change its interpretation of a statute, the agency's new view is entitled to deference only "if the agency adequately explains the reasons for a reversal of policy." *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). The BIA's second *Vasquez-Muniz* opinion lacks *any* explanation for the change, much less an adequate explanation.

The BIA's interpretation of the statute is not reasonable, and it is therefore unworthy of deference.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

STUART BANNER
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095

MATTHEW L. GUADAGNO
Counsel of Record
265 Canal Street, Ste. 506
New York, NY 10013
(212) 343-1373
Matthew@Guadagno-Immigration.com

APPENDIX

8 U.S.C. § 1101(a)(43)

The term "aggravated felony" means--

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in--

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year;

(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);

(J) an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that--

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of Title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in--

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) section 3121 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 3121 of Title 50 (relating to protecting the identity of undercover agents);

(M) an offense that--

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport

or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprison-

ment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.